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No. 85-936

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT LEO MORAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

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Petitioner contends that the court of appeals erred in reversing an order dismissing 16 counts of an indictment because of preindictment delay.

On March 11, 1980, petitioner was charged in a 16 count indictment returned in the United States District Court for the Western District of Washington with conspiracy to import marijuana, in violation of 21 U.S.C. 963; importation of marijuana, in violation of 21 U.S.C. 952 and 960; possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B); interstate and foreign travel to promote an illegal activity, in violation of 18 U.S.C. 1952 (two counts); use of a communication facility to facilitate the commission of a controlled substance felony, in violation of 21 U.S.C. 843(b) (two counts); obstruction of justice, in violation of 18 U.S.C. 1503; and making false declarations before the grand jury, in violation

of 18 U.S.C. 1623 (eight counts). On September 8, 1980, after the government's two main witnesses failed to appear in time for petitioner's scheduled trial, the government declined to proceed with the prosecution, and the district court dismissed the indictment without prejudice.

On April 15, 1983, some two years after the key witnesses returned, petitioner was reindicted. The new indictment contained the original 16 counts alleged in 1980 and an additional count alleging a conspiracy to defraud the Internal Revenue Service by laundering through foreign banks and corporations funds obtained from narcotics smuggling. On August 22, 1983, the district court dismissed the original 16 counts of the indictment on the ground that the preindictment delay deprived petitioner of due process of law (Pet. App. A18-A19). The government appealed from the dismissal. The court of appeals reversed (*id.* at A1-A9).[1] Relying on *United States* v. *Lovasco*, 431 U.S. 783 (1977), the court held that the record did not show any "government culpability" (Pet. App. A8) for the delay that could give rise to a due process violation.

Petitioner contends (Pet. 3-10) that the court of appeals erred in concluding that the record did not show government culpability for the delay and in substituting its view of the record for that of the district court. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court.[2] The court of appeals' decision places petitioner in precisely the same position he would have

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[1]The court of appeals affirmed (Pet. App. A9-A14) petitioner's conviction for conspiracy to defraud the Internal Revenue Service. Petitioner has not sought review of this ruling.

[2]It is now over 32 months since the return of the indictment and over 28 months since the district court's order. Further interlocutory review at this time would cause additional delay in the trial of the charges against petitioner.

occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1986

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[3]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.